

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>SHELBY FARLEY</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>ABOVE PAR TRANSPORTATION</b>	)	
Respondent	)	Docket No. <b>1,048,357</b>
	)	
AND	)	
	)	
<b>NATIONAL INTERSTATE INS. CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier (respondent) request review of the November 28, 2012, Award by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on April 10, 2013.

**APPEARANCES**

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Ryan D. Weltz of Overland Park, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

The Board has considered the entire record and adopted the stipulations listed in the Award.

**ISSUES**

The Administrative Law Judge (ALJ) found claimant sustained a 13% permanent functional impairment to the whole body. Claimant was awarded permanent partial disability (PPD) based on a 72.5% work disability (100% wage loss and 45% task loss).

The parties stipulated claimant met with personal injury by accident arising out of and in the course of his employment on October 29, 2009.

Respondent argues claimant sustained a scheduled injury only that resulted in a 12% permanent functional impairment to the left leg. Respondent contends that a credit

should be applied against PPD because of temporary total disability (TTD) respondent claims was overpaid. Respondent also maintains that an offset should be applied against the Award because of claimant's receipt of social security retirement benefits. Respondent contests the ALJ's determination of claimant's average gross weekly wage (AWW) and the ALJ's award of future medical treatment.

Claimant argues the ALJ erred in applying a retirement benefit offset. In the alternative, claimant argues the Award should be affirmed.

The issues for the Board's consideration are:

- (1) What is claimant's average gross weekly wage?
- (2) Is respondent entitled to a credit against the Award because of an overpayment of TTD?
- (3) What is the nature & extent of claimant's disability?
  - a. Did claimant sustain a scheduled injury or a disability to the body as a whole?
  - b. What is claimant's permanent impairment of function?
  - c. Is claimant entitled to PPD based on a work disability and, if so, to what extent?
- (4) Is respondent entitled to an offset against the Award based on claimant's receipt of social security retirement benefits?
- (5) Is claimant entitled to future medical treatment?

#### **FINDINGS OF FACT**

Claimant commenced employment for respondent as a truck driver on October 19, 2009. His first day of work was on October 20, 2009.

When injured on October 29, 2009, claimant was age 64 and was receiving social security retirement benefits in the monthly amount of \$776. The retirement benefits commenced in April 2009. Claimant planned to work and draw social security retirement benefits for the rest of his life. Effective January 2012, claimant received a 3% increase in his social security benefit to \$799.28 per month. There is no evidence that claimant has ever retired.

On October 29, 2009, claimant delivered a load of pipe with a tractor/flatbed trailer to an Amish community in Grant, Wisconsin. Some of the Amish people were unloading a bundle of pipe weighing about 900 pounds with a team of horses when the pipe ends closest to the horses became stuck in the ground. Claimant, who was standing about 10 feet behind the horses, was struck on the left side of his body by some of the pipes and was knocked to the ground. The pipes landed on claimant's left leg, pinning him on the ground. Claimant testified he experienced pain in his lower back, left arm and below the left knee. Claimant had no preexisting problems with his left lower extremity or lumbar spine.

Claimant was transported by ambulance to the emergency room of Memorial Medical Center in Neillsville, Wisconsin. He was diagnosed with the following: (1) an abrasion of the right forearm; (2) a comminuted fracture of the left tibia/fibula; (3) internal derangement of the left knee; and, (4) a non-displaced corner fracture of the lateral tibial plateau. Claimant's left lower leg fractures were treated surgically and claimant was discharged from the hospital on November 2, 2009. The hospital records do not document any complaints of low back symptoms.

Claimant was directed by the hospital to use a wheeled walker for two and a half months. Claimant testified his use of the walker, and left leg fatigue, increased his low back pain.

Dr. Robert Stringer, an orthopedic surgeon, provided claimant with post-surgical treatment commencing on November 6, 2009. Dr. Stringer recommended that claimant continue exercises, elevate his left leg and continue using a walker while ambulating. Dr. Stringer prescribed the use of a hinged brace for the left knee. On December 1, 2009, claimant returned to Dr. Stringer, who diagnosed a torn left anterior cruciate ligament (ACL).

Dr. Edward Prostic, a board certified orthopedic surgeon, evaluated claimant on December 14, 2009, at the request of claimant's counsel. The doctor reviewed claimant's medical records, took a history and performed a physical examination. Claimant complained of swelling in the left ankle and left knee, as well as intermittent low back pain that started immediately after the accident.

In Dr. Prostic's opinion, claimant's low back was injured in the October 29, 2009, accident and was aggravated by claimant's altered gait resulting from the left leg injuries. The doctor recommended an MRI scan of claimant's left knee. Dr. Prostic noted that treatment for claimant's low back was inadvisable until the left leg treatment was concluded.

Claimant was again seen by Dr. Stringer on December 15, 2009, and January 14, 2010. Dr. Stringer did not recommend surgery for the ACL injury and diagnosed a left medial collateral ligament (MCL) tear. On February 11, 2010, Dr. Stringer released claimant to return to work without restrictions. On March 11, 2010, Dr. Stringer found claimant had reached maximum medical improvement. No permanent work restrictions were imposed.

Following claimant's release by Dr. Stringer, respondent terminated claimant's employment. Claimant has not worked since his release. Dr. Stringer's office records reflect no complaints of low back pain. Dr. Stringer did not examine or treat claimant's low back. Dr. Stringer testified he does not treat lumbar spines.

Based on the AMA *Guides*<sup>1</sup>, Dr. Stringer rated claimant's permanent functional impairment at 7% to the whole person due to claimant's mild severity gait derangement. Dr. Stringer reviewed the list of claimant's former work tasks prepared by Mary Titterington and concluded claimant could perform all 18 tasks.

Dr. Daniel Stechschulte, a board certified orthopedic surgeon, examined and evaluated claimant on July 9, 2010, at the request of respondent's counsel. Dr. Stechschulte diagnosed degenerative arthritis and a possible torn ACL in the left knee and a crush syndrome in the left leg. The doctor ordered an MRI scan of the left knee, which revealed a probable meniscal tear, a small mensical cyst and a tibia fracture deformity.

On August 24, 2010, Dr. Vito Carabetta conducted EMG/nerve conduction studies which revealed peripheral neuropathy.

On November 8, 2010, Dr. Stechschulte performed surgery on claimant's left knee. The surgery consisted of arthroscopic partial medial/lateral menisectomies, debridement of the partial thickness ACL tear and patellofemoral chondroplasty.

Claimant used a walker again for a month after the knee surgery. Claimant testified:

Q. Did that [use of the walker] cause increased pain in your back?

A. Yes.

Q. Today after you have had this treatment as you start performing your activities of daily living when you are up around on your feet, does your leg get progressively more fatigued and painful?

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<sup>1</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

A. Yes.

Q. Does that cause you to maybe alter the way you walk?

A. Yes.

Q. And as your day continues do you feel increased pain in your back?

A. Yes.<sup>2</sup>

Claimant was released from treatment by Dr. Stechschulte on December 21, 2010. No permanent restrictions were imposed.

Dr. Stechschulte testified:

Q. During the course of your treatment, had you identified any gait disturbance?

A. Not identified. I believe he came in initially with a limp to be consistent with his injury and his surgery, and I believe most of that resolved at the time of my last examination.

Q. To the extent that you would have identified any abnormal gait or gait disturbance, would you have included it in your records?

A. I would hope so.<sup>3</sup>

. . . .

Q. When someone has a significant leg injury, is it common to have gait disturbance?

A. Yes.

Q. I note in your physical exam throughout your treatment, you do range of motion testing, but it doesn't look like in your examination you have a specific test to observe the patient walk in the examination room, is that correct?

A. I usually watch them walk in the hall or in the examination room.

Q. So you watched him walk for a short period of time?

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<sup>2</sup> R.H. Trans. at 26.

<sup>3</sup> Stechschulte Depo. at 10.

A. Yes. For instance, on the July 9th visit on the physical exam, it will say, "Gait is without appreciable limp."

Q. How long did you watch him walk, doctor?

A. Oh, usually it would be about 20, 30 seconds. It's more of a distance than a time.

Q. Twenty or 30 seconds he could walk halfway down the block?

A. Yeah, that's about what I have them walk, about -- no more than half block.<sup>4</sup>

Dr. Stechschulte testified claimant complained of back pain at all of his office visits. Dr. Stechschulte did not examine or treat claimant's low back.

Based on the *AMA Guides*, Dr. Stechschulte rated claimant's permanent functional impairment at 12% to the left leg due to medial and lateral meniscal resections, patellofemoral chondroplasty and exacerbation of his underlying left knee arthritis.

Dr. Stechschulte reviewed the list of claimant's former work tasks prepared by Ms. Titterington and concluded claimant was capable of performing all 18 tasks.

On March 23, 2011, claimant was re-evaluated by Dr. Prostic. Claimant's complaints included low back pain radiating into the left thigh and popping, weakness and intermittent aching of the left knee. X-rays of claimant's lumbar spine revealed severe degenerative disk disease at L5-S1 and a wedge deformity at L2. In Dr. Prostic's opinion, claimant's altered gait aggravated his preexisting degenerative disk disease.

Dr. Prostic rated claimant's lumbar spine at 10% to the whole body and the left leg at 25%. Dr. Prostic combined these ratings to 19% permanent impairment to the body as a whole. Dr. Prostic opined claimant was capable of returning to medium-level employment, should limit climbing, squatting and kneeling and also minimize activities below knee height.

Dr. Prostic reviewed the list of claimant's former work tasks prepared by Karen Terrill and concluded claimant could no longer perform 9 of the 20 tasks for a 45% task loss.

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<sup>4</sup> Id. at 19-20.

Ms. Terrill, a vocational rehabilitation counselor, interviewed claimant on May 18, 2011, at the request of claimant's attorney and prepared a list of 20 non-duplicated work tasks claimant performed in the 15-year period before the accidental injury.

Dr. Jeffrey MacMillan, a board certified orthopedic surgeon, performed an evaluation at the request of respondent's attorney on September 6, 2011. The doctor reviewed claimant's medical records, took a history and performed a physical examination. Dr. MacMillan diagnosed a healed left tibial plateau fracture, degenerative tears in the medial and lateral menisci of the left knee, peripheral neuropathy, and degenerative disk disease at L5-S1.

Dr. MacMillan attributed none of the following to claimant's work-related accident: (1) peripheral neuropathy, (2) tears of the left medial and lateral menisci, (3) degenerative disk disease at L5-S1, and (4) low back pain.

Based on the *AMA Guides*, Dr. MacMillan rated claimant's permanent functional impairment at 5% to the whole body, all of which he apportioned to claimant's preexisting degenerative disk disease. No work restrictions were imposed.

Dr. MacMillan testified:

Q. What was your rationale behind that apportionment?

A. Mr. Farley provided a couple explanations for how he related his low back pain to the October 2009 accident. One was that he said his back pain was a product of an altered gait. The other was the back pain started at the same time as the accident or injury he alleged occurred in October 2009. When I reviewed the medical records there really weren't any complaints of back pain until he saw Dr. Prostin, and then there was some subsequent reference to, I believe in Dr. Stechschulte's medical record, so there would appear to be a substantial hiatus between the actual time of the injury and the onset or declaration of his symptoms.

The second thing is Dr. Stechschulte's records indicate Mr. Farley was walking with a normal gait, so he can't attribute back pain to an abnormal gait as a result of the accident.<sup>5</sup>

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<sup>5</sup> MacMillan Depo. at 10-11.

Dr. MacMillan commented: "Mr. Farley's claim is not supported in the medical records."<sup>6</sup> Dr. MacMillan reviewed the list of claimant's former work tasks prepared by Ms. Titterington and concluded claimant could perform all 18 tasks.

On December 5, 2011, the ALJ ordered an independent medical evaluation by Dr. Peter Bieri. The IME occurred on December 5, 2011. The doctor reviewed claimant's medical records, took a history and performed a physical examination. The doctor recommended permanent restrictions of limited kneeling, squatting, crouching and crawling occasionally and no lifting greater than 50 pounds occasionally, 20 pounds frequently and 10 pounds constantly.

Dr. Bieri rated claimant's left leg at 19%<sup>7</sup> and claimant's low back at 5% to the whole body. Dr. Bieri apportioned 4% of his 5% low back rating to claimant's preexisting lumbar degenerative disk disease. He combined his 19% left leg rating with his 1% rating to the whole body for the low back and found an aggregate permanent impairment to the body as a whole of 11%. In Dr. Bieri's opinion, claimant demonstrated a gait derangement resulting from the accidental injury which aggravated the preexisting degenerative disease in claimant's low back.

Ms. Titterington, a vocational rehabilitation counselor, interviewed claimant on March 13, 2012, at the request of respondent's attorney. She prepared a list of 18 non-duplicated work tasks claimant performed in the 15-year period before his injury.

Claimant testified he continues to experience constant pain in his low back and left leg.

#### **PRINCIPLE OF LAW AND ANALYSIS**

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the

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<sup>6</sup> *Id.* at 36.

<sup>7</sup> In Dr. Bieri's December 5, 2011, report on page 6, he opined claimant suffered a 19% functional impairment to the left lower extremity. Then on page 7 of the same report, Dr. Bieri combines a lumbar impairment with a 25% functional impairment to the left lower extremity.



credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A 2009 Supp. 44-525(c) provides:

In the event the employee has been overpaid temporary total disability benefits as described in subsection (b) of K.S.A. 44-534a, and amendments thereto, and the employee is entitled to additional disability benefits, the administrative law judge shall provide for the application of a credit against such benefits. The credit shall first be applied to the final week of any such additional disability benefit award and then to each preceding week until the credit is exhausted.

K.S.A. 2009 Supp. 44-511(b)(5) provides in relevant part:

If at the time of the accident the money rate is fixed by the output of the employee, on a commission or percentage basis, on a flat-rate basis for performance of a specified job, or on any other basis where the money rate is not fixed by the week, month, year or hour, and if the employee has been employed by the employer at least one calendar week immediately preceding the date of the accident, the average gross weekly wage shall be the gross amount of money earned during the number of calendar weeks so employed, up to a maximum of 26 calendar weeks immediately preceding the date of the accident, divided by the number of weeks employed, or by 26 as the case may be, . . . .

K.S.A. 2009 Supp. 44-510d provides in relevant part:

If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . . .

(16) For the loss of a leg, 200 weeks.

. . . .

(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

(b) Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive for all other compensation . . . and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability, . . . .

K.S.A. 44-510e(a) provides in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 2009 Supp. 44-501(h) states:

If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

K.S.A. 2009 Supp. 44-510h(a) provides:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

K.S.A. 2009 Supp. 44-510k(a) provides in part:

At any time after the entry of an award for compensation, the employee may make application for hearing, in such form as the Director may require for the furnishing of medical treatment.

Claimant commenced employment for respondent on October 19, 2009, and his last day of employment before the date of his accident was October 28, 2009, a period of 10 days, or 1.43 weeks. During that period, claimant earned a total of \$927, or \$648.25 per week. Claimant's average gross weekly wage pursuant to K.S.A. 2009 Supp. 44-511(b)(5) is \$648.25, which yields a weekly compensation rate of \$432.19.<sup>8</sup>

There was an overpayment of TTD and respondent is entitled to a credit therefor against the Award. Respondent paid TTD for 11.71 weeks at the rate of \$546 per week, totaling \$6,398.57. Claimant is entitled to TTD for 11.71 weeks at the rate of \$432.19 per week, totaling \$5,060.94. TTD has accordingly been overpaid in the amount of \$1,337.63 and respondent is entitled to a credit against the Award in that amount. In the "AWARD" calculations set forth below respondent is provided credit for all TTD paid, including the amount of overpayment, by operation of the "less amounts previously paid" language.

Claimant successfully proved he sustained injuries to his left leg and low back as a result of the October 29, 2009 accident. Claimant's low back pain started immediately after the accident and was aggravated as a consequence of his serious left leg injuries. The opinions of both the neutral physician, Dr. Bieri, and Dr. Prostic support a causal connection between claimant's altered gait pattern and the aggravation of preexisting lumbar degenerative disease. Dr. Stechschulte testified that gait disturbances are common following lower extremity injuries. There is insufficient evidence claimant had any low back symptoms before the accident.

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<sup>8</sup> This method of computing an average gross weekly wage under K.S.A. 44-511(b)(5) was approved by the Kansas Court of Appeals in *Lynch v. U.S.D. No. 480*, 18 Kan. App. 2d 130, 850 P.2d 271 (1993).

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.<sup>9</sup> The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.<sup>10</sup>

Dr. Bieri's opinions regarding claimant's current functional impairment are more persuasive than the other ratings in the record. The ALJ did not err in finding claimant's permanent functional impairment is 19% to the left leg and 5% to the whole person for claimant's low back. As the judge found, those impairments combine under the AMA *Guides* to 13% to the whole body.

There is, however, no sound basis on which to conclude claimant had any permanent functional impairment to either his left leg or low back before the October 29, 2009 accident. The record establishes that claimant likely had degenerative disease in both the left knee and lumbar spine which existed before the accident. However, the evidence does not prove that claimant's pre-injury physical functioning was at all impaired. The opinion of Dr. Bieri apportioning 4% of his 5% rating for the low back to preexisting disease, and the opinion of Dr. MacMillan that all of claimant's low back impairment is related to preexisting degenerative disease, lack credibility because neither opinion adequately explains the lack of prior symptoms, the lack of a prior reduction in physical functioning and the onset of claimant's symptoms after the accident.

The ALJ also did not err in finding claimant's work disability is 72.5%. Other than a period of one month of accommodated employment, claimant has earned no wages since his accidental injury. His wage loss is therefore 100%. Only one task loss opinion considers both claimant's left leg and low back injuries and that opinion is Dr. Prostic's task loss of 45%.

The ALJ did not err in applying an offset against the Award because of claimant's receipt of social security retirement benefits. The purpose of the retirement benefit offset set forth in K.S.A. 2009 Supp. 44-501(h) is to prevent wage-loss duplication.<sup>11</sup> The Kansas Supreme Court has created an exception to the statute that applies to retired workers who

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<sup>9</sup> *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

<sup>10</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

<sup>11</sup> *Injured Workers of Kansas v. Franklin*, 262 Kan. 840, 942 P.2d 591 (1997); *McIntosh v. Sedgwick County*, 32 Kan. App. 2d 889, 91 P.3d 545, *rev. denied* 278 Kan. 846 (2004).

receive social security retirement benefits before reentering the workforce to supplement their social security income.<sup>12</sup>

Based on the holdings of the *McIntosh* and *Dickens* cases, if a claimant is injured before he or she retires, the employer is entitled to the statutory offset, as an injured employee is not entitled to recover both retirement benefits and workers compensation benefits beyond the value of their functional impairment.<sup>13</sup> But if an employee retires and then returns to work to supplement his or her income, the offset does not apply, as the employee's receipt of both workers compensation benefits and social security retirement benefits is not duplicative.<sup>14</sup>

In this claim, claimant did not retire before his accidental injury, nor did he retire after his injury. It was his intention to continue working and receive social security retirement benefits for the rest of his life. Accordingly, the ALJ correctly found that respondent is entitled to the retirement benefit offset. Although respondent correctly notes the Kansas Supreme Court has favored the interpretation of the Kansas Workers Compensation Act through only its plain language,<sup>15</sup> the Supreme Court has recently reiterated the holding in *Dickens*, suggesting *Dickens* is still controlling law.<sup>16</sup>

Respondent cites no authority to support the notion that claimant is not entitled to future medical treatment as set forth in Judge Moore's Award. Pursuant to K.S.A. 2009 Supp. 44-510h(a) and K.S.A. 2009 Supp. 44-510k, the ALJ did not err in finding claimant's right to future medical treatment should remain open subject to proper application.

#### **CONCLUSIONS OF LAW**

1. Claimant's average weekly wage is \$648.25.
2. Respondent is entitled to a credit against the Award for overpaid TTD in the amount of \$1,337.63.

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<sup>12</sup> *Dickens v. Pizza Co.*, 266 Kan. 1066, 974 P.2d 601 (1999).

<sup>13</sup> *McIntosh*, 32 Kan. App. 2d at 897-98.

<sup>14</sup> *Dickens*, 266 Kan. at 1071.

<sup>15</sup> See e.g., *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009); *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007).

<sup>16</sup> See *Robinson v. City of Wichita Employees' Retirement Board of Trustees*, 291 Kan. 266, 286, 241 P.3d 15 (2010).

3. The nature and extent of claimant's disability is as follows:

- a. Claimant sustained a general bodily disability, not a scheduled injury.
- b. Claimant's permanent functional impairment, which encompasses both the left leg and low back, is 13% to the body as a whole.
- c. Claimant is entitled to PPD based on a work disability of 72.5%, which consists of an average of 100% wage loss and a 45% task loss.

4. Respondent is entitled to an offset against the Award based on claimant's receipt of social security retirement benefits as set forth in the award calculations below.

5. Claimant is entitled to future medical treatment as set forth in the ALJ's decision.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>17</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**AWARD**<sup>18</sup>

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Bruce E. Moore dated November 28, 2012, is affirmed as modified.

Claimant is entitled to 11.71 weeks of temporary total disability compensation at the rate of \$432.19 per week or \$5,060.94 followed by 53.95 weeks of permanent partial disability compensation at the rate of \$253.11 per week or \$13,655.28 for a 13% functional disability followed by permanent partial disability compensation at the rate of \$247.74 per week or \$61,174.44 for a 72.50% work disability.

As of August 20, 2013, there would be due and owing to the claimant 11.71 weeks of temporary total disability compensation at the rate of \$432.19 per week in the sum of \$5,060.94 plus 53.95 weeks of permanent partial disability compensation at the rate of \$253.11 per week or \$13,655.28 followed by 85.32 weeks of permanent partial disability compensation at the rate of \$247.74 per week in the sum of \$21,137.18 for a total due and

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<sup>17</sup> K.S.A. 2009 Supp. 44-555c(k).

<sup>18</sup> The calculations in the "AWARD" section of this Order take into account the retirement benefit offset in the same manner as Judge Moore's decision.

owing of \$39,853.40, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$40,047.26 shall be paid at the rate of \$247.74 per week until fully paid or until further order from the Director.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August, 2013.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
wlp@wlphalen.com

Ryan D. Weltz, Attorney for Respondent and Insurance Carrier  
rweltz@wsabe.com

Honorable Bruce E. Moore, Administrative Law Judge